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No. 80-1352

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1981

SARAH D. BOLLOTIN,
Petitioner,

vs.

KAUFMAN, TAYLOR, KIMMEL & MILLER and STANLEY L. KAUFMAN, ALLAN K. PECKEL, RICHARD M. ROSENBERG, RUTH LEWINSON, DOE I-VI and "BOE" BOTNICK and "MOE" KALLENECK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Sarah D. Bollotin,
Petitioner, Pro Se,
310 Riverside Drive
Apt. 1202
New York, N.Y. 10025

QUESTIONS PRESENTED

1. Whether the District Court does have jurisdiction over the subject matter as well as over all of the parties.

2. Whether the District Court can dismiss the action in all respects on a motion for summary judgment and on the grounds that the complaint is barred by the statute of limitations.

3. Whether the Court of Appeals neglected its judicial function in affirming the trial court's failure to consider all of the material issues.

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In The

SUPREME COURT OF THE UNITED STATES

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No. . . . . .

SARAH D. BOLLOTIN,

Petitioner,

vs.

KAUFMAN, TAYLOR, KIMMEL & MILLER and STANLEY L. KAUFMAN, ALLAN K. PECKEL, RICHARD M. ROSENBERG, RUTH LEWINSON, DOE I-VI and "BOE" BOTNICK and "MOE" KALLENECK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the District Court, dated May 12, 1980 was not reported, nor was the opinion of the Second Circuit Court of Appeals dated October 29, 1980. Both opinions are reproduced in the Appendix, infra at 1a and Judgment at 10a and at 12a respectively.

JURISDICTION

Petitioner, Pro Se, did not petition for rehearing and this Court has jurisdiction under 28 U.S.C. Section 1254(1).

THE STATUTES INVOLVED

Petitioner instituted this action pro se pursuant to: 18 U.S.C. Sections 241, 1503, 1505, 1506, 1621, 1622 and 1623, 28 U.S.C. Sections 1331 and 1343[n.1] and in Federal Rules of Civil Procedure(Title 28) Rules: 8(a), 8(f), 9(b)[n.1] 12(e), 15(a), 42 U.S.C. Sections 1983 and 1985.

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n.1 - 28 U.S.C. #1915(d) from pg. A
F.R.C.P. Rule 9(b) from pg. A

In addition, to violations of the provisions of the Fourteenth Amendment of the United States Constitution.

Petitioner further invoked the pendent jurisdiction of the Court to consider claims arising under the laws of the State of New York Practice Law and Rules Sections 213 and 214.

Statutes involved are cited in brief in the Appendix, infra following the opinions.

STATEMENT OF THE CASE

This action stems from a tax suit against the United States Government filed by petitioner, pro se, on March 14, 1975, in the United States District Court, Southern District of New York (75 Civil 1282 DBB).

Respondent-attorneys were appointed by the District Court to act in petitioner's behalf as noted in the Opinion at (4a note 3, under 28 U.S.C. #1915(d). When informed that her case was lost, petitioner asked respondents to appeal but they washed their hands of the matter and told her to do it herself.

Thereupon petitioner began to delve

into the facts and discovered that a false and untrue Second Amended Complaint was filed and argued without her knowledge; that she was asked to appear for a Bench Trial on May 4, 1976 but was instructed to withhold true facts just before she was called to take the witness stand. Petitioner made a futile attempt to appeal to the Second Circuit.

Thereafter, petitioner began to search Second Circuit Court records and finally the Court Clerks named as respondents herein sent petitioner on a wild goose chase to check records at the Marine Military Ocean Terminal Depository in Bayonne, N.J.

Petitioner joined said Court Clerks in this action on the grounds of conspiracy to obstruct justice under 42 U.S.C. Section 1985 because they delayed and prevented earlier filing.

THE RULING BELOW

On March 26, 1980 respondent-attorneys filed Motion To Dismiss petitioner's complaint pursuant to F.R.Civ.P. Rule 12(h)(c) upon the grounds that there is a lack of jurisdiction over the subject

matter, and, pursuant to F.R.Civ.P. Rule 56(c) on the grounds that the applicable statute of limitations had expired before the commencement of this action.

Petitioner served and filed Memorandum of Facts and Law in Support of Affidavit In Opposition To Motion To Dismiss. There was no oral argument. On May 16, 1980 the District Court granted Judgment (10a) to respondents. Petitioner appealed. (See Second Circuit Opinion (12a).

REASONS FOR GRANTING THE WRIT

The District Court opinion erroneously asserts that the Court Clerks "have not been served with process." (2a[1]). To the contrary, the U.S. Marshal failed to serve process within the 60 days provided by law under 28 U.S.C. #2107. On February 6, 1980 petitioner complained thereof to the U.S.Attorney General and the Court Clerks were served in 110 days. The trial court did not check the records.

The District Court opinion (6a) states:

> "The only two jurisdictional bases which warrant any serious consideration are 28 U.S.C. #1331 and a claim of pendent jurisdiction."

The opinion continues:

> "The original claim was clearly a federal question... it is properly in federal court... it is abundantly evident that the damages... are, at most, in the vicinity of $1,000. Consequently, there is lacking the necessary $10,000 at issue under 28 U.S.C. #1331."

C. Wright, A. Miller and E. Cooper, in Federal Practice & Procedure, vol. 13 Supplement, Ch. 2 #3573 at pg. 371 states:

> "Any case that could be brought as a civil rights case under Sec. #1343(3) could be brought under the general federal question statute. The difference is that Sec. 1331 requires that more than $10,000 be in controversy while Sec. 1343(3) has no amount requirement."

In the same authority vol. 13 Supp., Ch.2, #3561 at pg. 314 there is the following:

> "In 1976 Congress cured, for the most part, the problem discussed in the main volume, when it amended 28 U.S.C. #1331 to provide that no amount in controversy is required in any action brought against the U.S., any agency thereof, or any officer or employee thereof in his official capacity."

These authorities continue at pg.336:

"The 1976 amendment of #1331 means that an amount in controversy is no longer required in federal question suits against the United States, any agency thereof, or any officer or employee thereof in his official capacity." Citing cases.

The District Court opinion then discusses the claim of pendent jurisdiction and states in error (7a):

"We cannot expect pro se litigant to understand the difference. Indeed, the concept of ancillary jurisdiction is ill defined, C. Wright, A. Miller & E. Cooper. Federal Practice & Procedure: Jurisdiction Sec. 3523."

In petitioner's Reply Brief on Appeal to the Second Circuit, Dobie on Federal Procedure, #84, pg.322 is cited as follows:

"The District Court...has jurisdiction of many matters or proceedings on the ground that these are incidental or ancillary to the principal controversy...Since this ancillary jurisdiction obtains by virtue of the incidental matter to the main case, the citizenship of the parties to, and the amount involved in, the ancillary proceeding are immaterial. This ancillary jurisdiction exists in order that the court may do complete justice..."

Petitioner emphasizes that had there been no prior cause of action in the District Court, there would have been no grievance. It has also been held:

> "The right to institute and maintain ancillary suits in the District Court in which the action was originally instituted...is well settled.
>
> "Any suit...must be regarded as ancillary to the main suit, and as cognizable in the Circuit Court regardless either of the citizenship of the parties or the amount in controversy."
> Hume v. N.Y., C.C.A. N.Y., 255 Fed. 488, 491.

In the following case the court held:

> "The Federal courts have always deemed that their statutory jurisdiction is implemented by an ancillary jurisdiction... based on the theory that it is essential to the independence and self sufficiency of the Federal courts."
> Aberdeen Hosiery Mills Co. v. Kaufman, 113 Fed.Supp. 833.

Petitioner's position is that the action is not necessarily time barred in the light of all of the allegations which, if proved at trial, could toll the running of the limitation period. It has been held:

"Federal Rule of Civil Procedure with respect to pleading fraud with particularity does not apply in view of 'report containing untrue statement of material fact or omitting to state a material fact;, and, 'Involvement of each defendant was sufficiently pleaded... where role of each... was briefly indicated and each of the individual defendants was identified..."
Husted v. Amrep Corp., 429 Fed. Supp. 298 (1977).

In the Husted case supra, at pg. 306, it is pointed out that the equitable tolling doctrine is normally read into every statute of limitations on federal causes of action. The District Court further held that it was wrongful:

"To extinguish this claim summarily on a statute of limitations ground at the pleading stage and without discovery. Limitations issues ordinarily require factual determinations and are best left to trial." Lasker, J.

Petitioner is in the position of Conley as follows:

"Federal Rules of Civil Procedure do not require a claimant to set our in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the

"claim[8] that will give the defendant fair notice...'

"Following the simple guide of Rule 8(f) that 'all pleadings shall be so construed as to do substantial justice' we have no doubt that petitioners' complaint adequately set forth a claim and gave respondents fair notice of its basis. The Federal Rules reject the approach that pleading is a game of skill (emphasis added)... and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2nd 80 (1957).

"Footnotes 8 and 9 in the Conley case, supra follow:

"8. Rule 8(a)(2), 28 U.S.C.

9. Rule 12(e) Motion for more definite statement.
Rule 15 (right to amend)."

In Hadad v. Lewis the court held: 382 Fed.Supp. 1365 (1974)

"It would be 'more appropriate to raise the affirmative defense of a time bar in Answer under F.R. Civ.P. Rule 8(c) rather than a motion to dismiss.

"In any case, a far less drastic form of relief is available at this time to the defendants in Rule 12(e) which allows them to request a more definite statement of the pleadings..." (Emphasis added).

A court may not ignore a federal statute plainly written. The facts here make review by writ of certiorari necessary and important. Review is required to direct the Appeals Court below to give due or express consideration to the errors alleged in the trial Court's decision, and cries out for exercise of this Court's supervisory responsibility.

CONCLUSION

Petitioner, pro se, who briefed the issues, contends that the Court of Appeals for the Second Circuit neglected its judicial function in failing to correct the trial court.

It is urged that review of the opinion and judgment of the Court of Appeals below is not only necessary but appropriate. This Petition should be granted.

Dated:
January 22, 1981

Respectfully submitted,

s/ Sarah D.Bollotin

Sarah D. Bollotin,
Petitioner, Pro Se.
310 Riverside Drive
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New York, N.Y.10025

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition For Writ of Certiorari with Appendix have been personally served on:

Milton S. Zeiberg,
Attorney for Respondent-Attorneys
60 East 42nd Street, Suite 1938
New York, N.Y. 10165
Tel. (212) 697-0722

and upon: John S. Martin, Jr.
United States Attorney for the
Southern District of New York
Attorney for Federal Respondents.
Stanley D. Davis, Assistant
United States Attorney,
Of Counsel
One St. Andrew's Plaza
New York, N.Y. 10007
Tel: (212) 791-1994

s/ Sarah D. Bollotin

Copy Received
s/ John S. Martin, Jr.
United States Attorney
1/23/81 12:55 p

s/ Copy Received
Milton S. Zeiberg
Atty for Defendants
except Doe Boe and Moe
Jan. 23, 1981

APPENDIX
1a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - X :

SARAH D. BOLLOTIN, : 79 Civ. 6370 (GLG) Pro Se
Plaintiff, :

-against- :

KAUFMAN, TAYLOR, KIMMEL & MILLER and STANLEY L. KAUFMAN, ALLAN K. PECHEL, RICHARD M. ROSENBERG, RUTH LEWINSON, DOE I-VI, and "BOE" BOTNICK and "MOE" KALLENECK; : O P I N I O N

Defendants. :

- - - - - - - - - - - - - - -X

A P P E A R A N C E S :

SARAH D. BOLLOTIN
Plaintiff Pro Se
310 Riverside Drive #1202
New York, N.Y. 10025

MILTON S. ZEIBERG, ESQ.
Attorney for Defendants
(except "Doe," "Boe," and "Moe")
60 East 42nd Street
New York, N.Y. 10017

G O E T T E L, D. J.:

The lawyer defendants in this case move to dismiss for lack of jurisdiction over the subject matter and on grounds that the complaint is barred by the statute of limitations.[1/]

The plaintiff, who appears pro se in this action, was at one time a schoolteacher and librarian employed by the Newark, New Jersey, Board of Education.

1/ Besides the lawyers, there are two other defendants named, "Boe" Botnick and "Moe" Kalleneck. They are allegedly clerks of the United States Court of Appeals for the Second Circuit. They have not been served with process. The complaint is not clear as to what their alleged torts were, and makes reference solely to the fact that the plaintiff filed an appeal in the Court of Appeals and made a fruitless effort to take the case to the United States Supreme Court.

On her income tax returns for the year 1970, she claimed $1,058 as a retirement income credit for contributions made to New Jersey's "Supplemental Annuity Collective Trust." The Internal Revenue Service refused to allow the deduction since Ms. Bollotin had not entered into a binding and irrevocable agreement prior to the time the contributions were made. (The contributions were made over a three-year period, 1968-70). After exhausting administrative remedies, she commenced an action pro se in this district court in 1975 seeking to recover $1,058[2/].

The case was assigned to Judge Dudley Bonsal of this court, who subsequently requested the lawyer defendants

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2/ The total amounts contributed for the years in question amounted to #1326. Whether this in fact would entitle her to recover $1058 plus interest, had the contributions been properly made, is a matter which was never determined.

in this case to represent Ms. Bollotin without fee.[3] The case was tried the following year, and Judge Bonsal wrote a nine-page opinion explaining why the plaintiff was not entitled to a tax refund. In the opinion, the court noted its appreciation for the able service rendered on behalf of plaintiff by her counsel. Judgment was entered October 22, 1976.

More than three years later, on November 28, 1979, plaintiff filed her complaint in this action, seeking $1 million in damages from the lawyers and two clerks of the Court of Appeals.[4]

3/ Presumably, he proceeded under 28 U.S.C. #1915(d), which provides that the court may request an attorney to represent an indigent person. This practice results in district judges requesting favors of attorneys who practice before them -- favors that the attorneys may not feel in a position to deny. In addition, as will be seen from the facts if this case, it has other defects.

4/ See note 1 supra.

After reciting in summary form the facts outlined above, the complaint alleges that plaintiff requested that she be kept fully informed of all proceedings by her appointed counsel and that, nevertheless, counsel appeared in court without her knowledge and subsequently lost the case. As a result, it is contended,

> "plaintiff was held up to scorn, hatred, ridicule and contempt and was evicted from her apartment causing plaintiff great hardship, humiliation, physical injury and illness and damages in the sum of one million dollars. As a consequence, plaintiff decided to sue counsel for malpractice but was thwarted, obstructed and delayed by the Court Clerks named hereinabove."

The complaint premises jurisdiction upon a dozen different statutes. Most of these are sections of the criminal law of the United States, Title 18 of the United States Code, which do not, per se, provide a jurisdictional basis for a civil action. Several of the civil rights statutes and the Fourteenth Amendment of the United States Constitution are also cited as being jurisdictional

bases.[5/] A broad-brush claim that any denial of legal rights amounts to a civil rights violation is, of course, not adequate. The plaintiff specifically eschews any claim of diversity jurisdiction, and it is clear that such does not exist.

The only two jurisdictional bases which warrant any serious consideration are 28 U.S.C. #1331 and a claim of pendent jurisdiction. These two are fairly closely allied. The original claim was clearly a federal question and, moreover, since it was a suit against the United States Government, it was properly in federal court. An argument could be made that the facts in this case create a federal question. However, despite the demand for $1 million in damages, it is abundantly evident that the damages for the alleged attorney's malpractice are, at most, in the vicinity of $1,000. Consequently, there is lacking the necessary $10,000 at issue under 28 U.S.C. #1331.

5/ Specifically 28 U.S.C. #1343 and 42 U.S.C. ##1983, 1985.

The question of whether this Court should accept this action under the ambit of pendent jurisdiction is a rather novel question. The basic problem with a claim of pendent jurisdiction is that the earlier case has long since been disposed of, and there is nothing for the instant claim to be pendent to. Indeed, until the earlier action was completed, the instant cause of action for malpractice could not exist. However, since this is a pro se action, it seems appropriate to consider the assertion of pendent jurisdiction as a possible claim of ancillary jurisdiction. The distinction between the two is confusing even to attorneys and we cannot expect the pro se litigant to understand the difference. Indeed, the concept of ancillary jurisdiction is ill defined. C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction #3523.

Under the concept of ancillary jurisdiction, once a district court has acquired jurisdiction of a case or controversy, it has, incident to such jur-

isdiction, the ability to dispose of any matter properly before it, or any "other matters raised by the case of which it could not take cognizance were they independently presented." Id. In a sense, the current application before this Court is ancillary to the earlier judicial appointment of counsel and the trial of the original action. If this were an action for attorneys' fees by one of the counsel it might properly be considered ancillary to the earlier litigation. State of Iowa v. Union Asphalt & Roadoils, Inc., 409 F.2d 1239 (8th Cir. 1969). However, it does not appear that this claim was truly ancillary to the earlier proceeding. See C. Wright, A. Miller & E. Cooper, supra, at 71. The determination here is not one necessary in order to give effect to the relief of the court on the earlier federal claim. Indeed, it actually challenges the earlier decision of the court as well as the court's determination that assigned counsel had done a commendable job. Consequently, it does not appear that this Court has ancillary

jurisdiction over the claim for an attorney's malpractice on an earlier action.

Even if there is jurisdiction, however, it is clear that the action is time-barred. The action is for malpractice by an attorney. This is governed by New York Civil Practice Law & Rules #214(6), which sets a three-year period of limitations. Since the suit was not commenced until more than three years after the earlier trial was decided, it is time-barred.

The attorney defendants' motion to dismiss is granted. Moreover, since many months have passed without service of process having been made on the Court of Appeals clerks, and since the complaint does not, in any event, state a cognizable cause of action against them, the action is in all respects dismissed.

SO ORDERED:

Dated: New York, N.Y.
May 12, 1980.

s/ Gerard L Goettel
U.S.D.J.

Goettel, J.

10a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

79CIVIL 6370 (GLG)

SARAH D. BOLLOTIN

Plaintiff

-against-

KAUFMAN, TAYLOR, KIMMEL & MILLER and STANLEY L. KAUFMAN, ALLAN K. PECHEL, RICHARD M. ROSENBERG, RUTH LEWINSON, DOE I-VI, and "BOE" BOTNICK and "MOE" KALLENECK:

Defendants.

JUDGMENT

The lawyer defendants in this case having moved to dismiss for lack of jurisdiction over the subject matter and on grounds that the complaint is barred by the statute of limitations, and the said motion having come on before the Honorable Gerald L. Goettel, United States District Judge, and the Court thereafter on May 13, 1980, having handed down its opinion granting said motion and dismissing the action in all respects, it is,

ORDERED, ADJUDGED AND DECREED:

That the complaint be and it is hereby dismissed as to all defendants.

Dated: New York, N.Y.
May 16, 1980

s/ Raymond F. Burghardt
Clerk

SEAL
U.S. DISTRICT COURT
Filed
May 16, 1980
S.D. OF N.Y.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York on the twenty-ninth day of October One-Thousand Nine Hundred and Eighty.

PRESENT: HONORABLE HENRY J. FRIENDLY,
HONORABLE WALTER R.MANSFIELD,
HONORABLE THOMAS J. MESKILL,
Circuit Judges.

- - - - - - - - - - - - -

SARAH D. BOLLOTIN,
Plaintiff-Appellant,

v.

KAUFMAN, TAYLOR, KIMMEL & MILLER and STANLEY L. KAUFMAN, ALLAN K. PECKEL, RICHARD M. ROSENBERG, RUTH LEWINSON, "DOE" I-VI and "BOE" BOTNICK AND "MOE" KALLENECK,

Defendants-Appellees,

80-7464

- - - - - - - - - - - - -

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Sarah Bollotin appeals Pro Se from a judgment of the United States District Court for the Southern District of New York, entered by Judge Gerald L.Goettel, dismissing her complaint brought pursuant to 42 U.S.C. #1983 and Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

Bollotin's complaint in the district court seeks $1 million in damages against the law firm that represented her in earlier unsuccessful income tax litigation. The complaint alleges that her attorneys failed to keep her fully informed of the progress of her case and that they appeared in court without her knowledge and subsequently lost her case. Bollotin includes in her complaint "Boe" Botnick and "Moe" Kalleneck (the correct names are Martin Bottinick and Donald Kalleneck), both clerks in the Court of Appeals' records room whom she claims delayed her filing the malpractice claim.

Judge Goettel dismissed her complaint against the members of the law firm on the grounds that the court lacked subject matter jurisdiction and that the action was barred by the stat-

ute of limitations.

There is no diversity of citizenship between Bollotin and the law firm defendants. Also, Bollotin's malpractice action fails to raise a federal question. Bollotin's jurisdictional argument that her malpractice claim is "ancillary" to the original claim for her tax refund is also without merit. Her claim for a tax refund was decided earlier and was affirmed on appeal. Therefore, when this action was instituted there was no case or controversy to which her malpractice claim could be ancillary.

Bollotin claims that the applicable statute of limitations should be the six-year period for actions based on fraud. However, she did not plead fraud either in her complaint or in any of her moving papers in the district court. Allegations of fraud must be stated with particularity in the complaint filed in the district court in order to state a cause of action. Fed. R. Civ. P. 9(b)

The judgment in the tax case was entered on October 22, 1976. The instant action was commenced on Novem-

ber 28, 1979, beyond the three-year applicable statute of limitations in New York. Leonhard v. United States, slip op. 5213, 5229 (2d Cir.Aug. 28, 1980): Quinn v. Syracuse Neighborhood Corp., 613 F.2d 438, 449 (2d Cir. 1980). Thus, Judge Goettel was correct in holding that Bollotin's claim against the defendant law firm was barred by the statute of limitations.

Inasmuch as Bollotin's claim against the federal defendants does not contain specific allegations of fact and is stated solely in conclusionary terms, dismissal of her claim against them was also proper. Kock v. Yunich, 533 F.2d 80, 85 (2d Cir. 1976); Powell v. Jarvis, 460 F.2d 551, 553 (2d Cir. 1972).

The judgment of the district court is affirmed.

SEAL
UNITED STATES
COURT OF APPEALS
FILED
OCT 29 1980
SECOND
CIRCUIT

s/ Henry J. Friendly
Henry J. Friendly

s/ Walter R. Mansfield
Walter R. Mansfield

s/ Thomas J. Meskill
Thomas J. Meskill

CIRCUIT JUDGES

J.Goettel

BRIEF AUTHORITIES DIGEST

Constitutional Provisions:

Amendment XIV Sec.1 - States prohibited from abridging privileges or immunities of citizens of the United States... or depriving any person of due process or equal protection of the laws.

New York State Civil Practice Law & Rules:

Sec. 213 provides that action be commenced within six years... based on mistake... or fraud.

Sec. 213(1) an action for which no limitation is specifically prescribed by law...

Sec. 213(8) an action based upon fraud.

Sec. 214(6) an action to recover damages for malpractice, other than medical malpractice.

United States Statutes:

18 U.S.C. Sec. 241 - Conspiracy against rights of citizens.

18 U.S.C. Sec. 1503 - Influencing... witness generally.

18 U.S.C. Sec. 1505 - Obstruction of proceedings...

18 U.S.C. Sec. 1506 - Theft or alteration of record or process.

18 U.S.C. Sec. 1621 - Perjury generally.

18 U.S.C. Sec. 1622 - Subornation of Perjury.

18 U.S.C. Sec. 1623 - False declarations before... court.

28 U.S.C. Sec. 1254(1) Authority for writ.

28 U.S.C. Sec. 1331 - Fed'l question: amount in controversy

28 U.S.C. Sec. 1332 - Diversity of citizenship.

28 U.S.C. Sec. 1343 - Civil rights.

28 U.S.C. Sec. 2107 - Sixty (60) days for service upon U.S. or officer or agency thereof.

28 U.S.C. 1915(d) - Provision for appointment of attorney to indigent litigant.

42 U.S.C. Sec. 1983 - Civil rights.

42 U.S.C. Sec. 1985 - Conspiracy to interfere with civil rights.

Federal Rules of Civil Procedure
(Title 28 U.S.C.)

Rule 8(a) All that is required is a 'short and plain statement of the claim.'

Rule 8(c) More appropriate to raise question in answer rather than in a motion to dismiss.

Rule 8(f) All pleadings shall be so construed as to do substantial justice.

Rule 9(b) Fraud, misrepresentation, falsity, scienter.

Rule 12(e) Motion for a more definite statement.

Rule 12(h)(c) Lack of jurisdiction over subject matter.

Rule 15 - Right to amend.

Rule 56(c) Statute of limitations bar.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1352

SARAH D. BOLLOTIN,

Petitioner,

v.

KAUFMAN, TAYLOR, KIMMEL & MILLER and STANLEY L. KAUFMAN, ALLAN K. PECKEL, RICHARD M. ROSENBERG, RUTH LEWINSON, DOE I-VI and "BOE" BOTNICK and "MOE" KALLENECK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, EXCEPT DOE, BOE AND MOE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1352

SARAH D. BOLLOTIN,

Petitioner,

v.

KAUFMAN, TAYLOR, KIMMEL & MILLER and STANLEY L. KAUFMAN, ALLAN K. PECKEL, RICHARD M. ROSENBERG, RUTH LEWINSON, DOE I-VI and "BOE" BOTNICK and "MOE" KALLENECK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS, EXCEPT DOE, BOE AND MOE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This Brief is respectfully submitted in behalf of respondents Kaufman, Taylor, Kimmel & Miller, Stanley L. Kaufman, Allan K. Peckel, Richard M. Rosenberg and

Ruth Lewinson.

The complaint was filed on November 28, 1979 in the United States District Court for the Southern District of New York. The complaint alleged that petitioner made a tax claim on her income tax return for 1970 which was disallowed, and she then filed an action (District Court for the Southern District of New York, 75 Civ. 1282 Pro Se). The action was subsequently assigned to Judge Dudley B. Bonsal of that Court.

The complaint alleged that at a pretrial conference Judge Bonsal appointed Stanley L. Kaufman, Esq. as her attorney; that petitioner attended a conference in Mr. Kaufman's office on November 24, 1975 at which time she presented the facts and requested that she be kept fully informed of all proceedings, and that to the contrary, Mr. Kaufman appeared in the United States District Court on December 8, 1975

without her knowledge and subsequently lost her case.[1/]

The complaint further alleged that petitioner filed an appeal (Docket 76-6187), made a fruitless effort to take the case to the United States Supreme Court[2/] and as a result petitioner was held up to scorn, hatred, ridicule and contempt and was evicted from her apartment causing her great hardship, humiliation, physical injury and illness and damages in the sum of $1,000,000.

The complaint named three additional defendants, Doe I-VI, "Boe" Botnick and "Moe" Kalleneck, alleged to be United States District Court clerks who handled official court papers on the 18th floor of the Courthouse. The complaint alleged that petitioner decided to sue counsel for

1/ The record showed that petitioner attended and testified on her own behalf on the trial.

2/ After the affirmance by the Second Circuit of Judge Bonsal's opinion and order on petitioner's pro se appeal.

malpractice, but was thwarted, obstructed and delayed by said clerks.

In the earlier case which was tried before Judge Bonsal, petitioner made a claim for a tax refund of $1,058 plus interest against the Internal Revenue Service as a result of the disallowance of a retirement income credit on her 1970 income tax return. In a painstaking review of her claim, Judge Bonsal, in his opinion and order dated July 30, 1976 reviewed the facts and law concerning such claim and held in favor of the Internal Revenue Service. It appeared from the opinion that petitioner's case was decided substantially on the basis of documentary evidence and hinged on petitioner's failure to execute requisite forms in order to qualify for the tax credit claimed as required by the Internal Revenue Code. In a footnote to the opinion Judge Bonsal expressed the appreciation of the Court for the able services

rendered by Stanley L. Kaufman, Esq.

More than three years after the opinion and order was rendered in the District Court, petitioner turned on her counsel and the clerks of the Second Circuit by filing this action. After service of the answer which denied the allegations of malpractice and alleged the action was barred on jurisdictional and limitation grounds, the respondents (except Doe, Boe and Moe) moved to dismiss the complaint under F.R.Civ.P. Rule 12(h)(3) upon the grounds that there was a lack of jurisdiction over the subject matter and under F.R.Civ.P. Rule 56(e) upon the ground that the complaint failed to state a claim upon which relief can be granted for the reason that the applicable state statute of limitations had expired before the commencement of the action.

The motion of said respondents in the District Court came on regularly to be

heard before Judge Gerard L. Goettel. Judge Goettel rendered an opinion and order on May 12, 1980 (Petitioner's Appendix, 1a-11a) which dismissed petitioner's complaint upon the grounds that the District Court did not have jurisdiction of the subject matter of the action and that it was time-barred. The Second Circuit in an opinion and order dated October 29, 1980 (Petitioner's Appendix, 12a-15a) affirmed on the same grounds.

REASONS FOR DENYING THE WRIT

POINT I

THE DISTRICT COURT DID NOT HAVE JURISDICTION OVER PETITIONER'S MALPRACTICE CLAIM AGAINST RESPONDENTS

Petitioner in her complaint sought to create federal jurisdiction on the basis of a common law malpractice claim against respondents in the absence of diversity jurisdiction. None of the compelling reasons for the grant of a writ of certiorari set forth in Rule 17 of the Rules of this Court

is present.

The District Court properly held that the criminal statutes cited in petitioner's complaint did not provide a jurisdictional basis for a civil action, nor did a broad-brush claim that any denial of legal rights amounts to a civil rights violation under the statutes cited or the United States Constitution. The opinion noted that petitioner specifically eschewed any claim of diversity jurisdiction and that it was clear that such did not exist.

The District Court's opinion was likewise proper in denying jurisdiction under 28 U.S.C. § 1331 upon the ground that despite petitioner's demand for $1,000,000 in damages, it was abundantly evident that the damages for the alleged attorney's malpractice were, at most, in the vicinity of $1,000 and consequently the necessary $10,000 at issue under 28 U.S.C. § 1331 was

lacking. The District Court's opinion was further correct in holding that pendent jurisdiction did not exist because the earlier case had long since been disposed of and there was nothing for the instant claim to be pendent to since until the earlier action was completed the instant action for malpractice did not exist.

Finally, the District Court correctly held that the instant action was not truly ancillary to the earlier proceeding for the reason that the instant action was not necessary in order to give effect to the relief on the earlier federal claim and indeed the instant complaint actually challenged the earlier decision.

In affirming, the Second Circuit properly held that petitioner's malpractice action failed to raise a federal question, and that the jurisdictional argument by petitioner that the malpractice

claim was ancillary to the original claim for a tax refund was also without merit.

POINT II

THE OPINIONS BELOW PROPERLY HELD THAT PETITIONER'S MALPRACTICE CLAIM WAS TIME-BARRED UNDER THE NEW YORK STATUTE OF LIMITATIONS

The record below indicated that the instant action was commenced on November 28, 1979 over three years after the date of Judge Bonsal's opinion and order of July 30, 1976 which had dismissed the earlier tax case. The record also indisputably indicated that all of the legal services were performed in the State of New York, and were completed on or before Judge Bonsal's opinion and order was rendered.

In that the legal services were performed in the State of New York, the applicable statute of limitations governing petitioner's case, if any, was the statute of limitations of the State of New York.

Leonhard v. United States, slip op. 5213, 5229 (2d Cir. Aug. 28, 1980); Quinn v. Syracuse Neighborhood Corp., 613 F.2d 438, 449 (2d Cir. 1980). See, also, Guarantee Trust Co. v. York, 326 U.S. 99, 109 (1945).

To the extent petitioner's complaint alleged a claim in common law malpractice, it was time-barred by New York's three-year statute of limitations under Civil Practice Law and Rules (CPLR) § 214(6). The District Court and Second Circuit opinions which held that it was clear that the action was time-barred were proper and should not be disturbed.

Petitioner argued for the first time in the Second Circuit that the applicable statute of limitations should be the New York six-year period for actions based on fraud. The Second Circuit properly held that petitioner did not plead fraud either in her complaint or in any of her moving papers in the District Court, and that

allegations of fraud must be stated with particularity when filed in the District Court in order to state a cause of action, F.R.Civ.P. Rule 9(b). Finally, it is respectfully submitted that there was no merit to petitioner's contentions on any basis even if her claims were not time-barred.

CONCLUSION

The petitioner has made no credible claim of federal jurisdiction, and in any event her claims were time-barred under the applicable New York statute of limitations. The Petition for a writ of certiorari should be denied.

Dated: New York, New York
February 17, 1981

Respectfully submitted,

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No.80- 1352

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1980

Sarah D. Bollotin,

Petitioner,

vs.

Kaufman, Taylor, Kimmel & Miller and STANLEY L. KAUFMAN, ALLAN K. PECKEL, RICHARD M. ROSENBERG, RUTH LEWINSON, DOE I-VI and "BOE" BOTNICK and "MOE" KALLENECK,

Respondents.

REPLY TO RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OCTOBER TERM, 1980

NO. 80-1352

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REPLY TO RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioner's Reply To Respondents, Except Doe, Boe & Moe, In Opposition To Petition For A Writ of Certiorari must be very brief because her time in which to reply has run out.

Petitioner wanted to serve only one Reply Brief (herein) upon all of her adversaries. Petitioner served all legal papers upon the Respondents of record. Upon calling the U.S. Assistant Attorney to ask for his Reply Brief, Petitioner learned that he could no longer

handle the case since the U. S. Solicitor-General must do so. After innumerable telephone calls and letters, the U.S. Solicitor-General has waived the right to reply as to the Federal Clerks sued herein on the grounds of conspiracy to obstruct justice. The Opinion of the U.S. District Court Judge is obviously in error (Appendix 2a) since the Clerks were served. If it were only for this reason the case should be remanded to the lower Courts.

Because Petitioner tried to play fair with all parties she is now threatened with an overnight deadline.

The blunt question is: Can an attorney deliberately, knowingly and wilfully file a false instrument in the U. S. District Court and thereafter argue said false and untrue Second Amended Complaint and mislead petitioner to commit perjury against herself. Petitioner challenged the earlier District Court Decision on these grounds.

Petitioner now realizes that her opponents constitute a powerful clubhouse of lawyers and their retinue and that the lower courts rule on the status of the parties rather than on the merits of the cause.

CONCLUSION

Petitioner has been subjected to constant, unremitting, vicious, harassment, intimidation and obstruction.

This case cries out for exercise of this Honorable Court's supervisory responsibility. The lower courts have failed to in their duty.

Petitioner has always honored and respected our United States Constitution and all of our laws and prays that Petition For A Writ Of Certiorari will be granted so that equal justice under the law will prevail.

Respectfully submitted,

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